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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CHRISTOPHER JUSTIN OLIVER, Plaintiff and Appellant, v. CITY OF LOS ANGELES and STEVEN ULRICH, Defendants and Respondents.	B168343 (Los Angeles County Super. Ct. No. BC246184)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rodney E. Nelson, Judge. Reversed.

Grassini & Wrinkle and Roland Wrinkle for Plaintiff and Appellant.

Rockard J. Delgadillo, City Attorney, Janet Bogigian, Supervising Attorney, and Amy Jo Field, Deputy City Attorney, for Defendants and Respondents.

BACKGROUND

Appellant's first amended complaint seeks damages against respondents, City of Los Angeles and Steven Ulrich, for the death of appellant's father, Christopher Ray Oliver, based upon theories of battery and negligence. It alleges that on July 24, 2000, Oliver was driving a pick-up truck on Friar Street in the City of Los Angeles, when the truck became disabled due to mechanical failures that rendered the steering and other mechanisms inoperable; that while Oliver was attempting to operate the disabled truck, Steven Ulrich, an off-duty police officer, emerged from his residence, called 911, approached the truck, and ordered Oliver out, although the driver side door was blocked by another vehicle; that Ulrich then fired six or seven shots toward Oliver; and that Ulrich went around the truck to the passenger side, where he fired two more shots through the window, fatally wounding Oliver.

The first amended complaint further alleges that Oliver was unarmed and non-threatening, and lethal force against him was unnecessary. It is alleged that Ulrich was acting within the course and scope of his employment with the City of Los Angeles, that the City's hiring, training, and supervision of Ulrich was negligent and reckless, and that the actions of the City and Ulrich violated established policy.

Respondents brought a motion for summary judgment relying upon the theories of self-defense, justifiable homicide and immunity. Their argument is summarized in the following paragraphs from their points and authorities:

> "Under Penal Code § 196, a police officer who kills someone has committed a justifiable homicide if the homicide was 'necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any legal duty' or 'when necessarily committed in retaking felons who have been rescued or

who have escaped . . . and who are fleeing from justice or resisting such arrest.' There can be no civil liability under California law as a result of a justifiable homicide.

'"The test for determining whether a homicide was justifiable under Penal Code § 196, is whether the circumstances 'reasonably create[d] a fear of death or serious bodily harm to the officer or another.' A police officer reasonably believes that an armed suspect poses a threat of serious harm to either the officer or others, *when the officer orders the suspect to drop his weapon and the suspect refuses*.' Some courts have held that the mere *reasonable appearance* of danger is all that is required for the lawful use of self defense.

". . .

"In the instant case, Oliver's 'weapon' was his car. He had already crashed his pick-up into several parked vehicles. Noorda [a witness] testified that had he not gotten out of Oliver's way, Oliver would have intentionally ran him over. He also testified that he thought Oliver was going to run over Ulrich. A crowd had gathered around Oliver's pick-up and he was trying to drive away. When Ulrich ordered Oliver to turn off his engine and get out of the truck, Oliver just looked at Ulrich, accelerated the gas, manipulated the gear shift and put the truck in reverse in what can only be viewed as an attempt to escape. The wheels were spinning, the engine was revving, and the truck had moved forward, backward and forward again. Under these circumstances, Ulrich's use of force, was necessary to prevent serious bodily harm to himself and the crowd

that had gathered and is therefore privileged as a matter of law under *Garner*. [¶] . . . [¶]

"Under Government Code § 820.2 a public employee is immune from liability for his discretionary acts. Generally speaking, a discretionary act within the meaning of 820.2 is one which requires personal deliberation, decision, exercise in judgment and choice. It involves an equitable decision as to what is just and proper under the circumstances. Ulrich exercised discretion when he shot Oliver. In what was a rapidly evolving situation, Ulrich had to decide whether Oliver was going to drive his truck into either himself or the crowd which had formed. Based on what he observed (i.e., spinning tires, revving engine, the car moving forward and backward and then forward again) Ulrich had to quickly determine the best course of conduct given the immediate. In doing so he exercised his judgment. As such, officer Ulrich is immune from liability pursuant to Government Code § 820.2.

"Finally, '[because officer Ulrich] cannot be liable, there is no basis for respondeat superior liability against the [city]. Government Code section 815.2 public entity not liable for acts of employee if the employee is immune from liability." (Fns. omitted, italics in the original, brackets in the original, and there is no close to the quotation in the final paragraph. The reference to *Garner* is to *Tennessee v. Garner* (1985) 471 U.S. 1.)[1]

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[1] Section 820.2 provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Section 815.2, subdivision (b) provides: "Except as

The trial court granted the motion for summary judgment issuing the following statement in a minute order:

> "Upon review, the Court has decided to grant defendants' motion for summary judgment herein. The officer was faced with a drunken driver who had crashed into several parked cars, who ignored the officer's order to vacate the truck, and who was apparently attempting to escape. In those circumstances, it appears to the Court that a jury could not reasonably find that the officer's use of force was excessive. I believe that Government Code Section 820.2 immunity applies, and that the officer's conduct was proper under Penal Code Section 196 and Civil Code section 50."[2]

Judgment was entered against appellant and in favor of respondents on April 30, 2003. Appellant filed a timely notice of appeal from the judgment on June 24, 2003.

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otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

[2] As pertinent, Penal Code section 196 states: "Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either [¶] . . . [¶] 2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or [¶] 3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest."

Civil Code section 50 provides: "Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest."

DISCUSSION

Appellant contends that it was error to grant the motion for summary judgment, because there remained triable issues of fact regarding the reasonableness of Ulrich's actions, and the evidence on the issues was disputed. Respondents contend, among other things, that since the question of what was reasonable must be measured under an objective test, it is the role of the court, not the jury, to resolve any factual issues as a matter of law.

Before considering the parties' contentions, and to put them in perspective when we do so, we shall begin at the beginning and conduct our own review of the motion and supporting papers under the rules governing summary judgment motions on appeal. We review summary judgments de novo. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 860 (*Aguilar*).) A defendant who moves for summary judgment must make a prima facie showing of the nonexistence of any triable issue of material fact by producing evidence to show, either that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to the action. (*Aguilar*, *supra*, 25 Cal.4th at p. 850; Code Civ. Proc., § 437c, subd. (o)(2).) If the moving defendant successfully makes a prima facie showing, the burden then shifts to the plaintiff to show of the existence of a triable issue of material fact. (*Ibid*.)

When a defendant seeks to show that the plaintiff cannot establish an element of the cause of action, the "defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence--as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar*, *supra*, 25 Cal.4th at p. 855.)

Respondents' moving papers did not base their motion on a claim that appellant did not possess and could not reasonably obtain needed evidence. Instead, respondents sought to establish that Ulrich's shooting of Oliver was reasonable under the circumstances.

The motion referenced immunity for Ulrich's actions pursuant to Government Code section 820.2, extending to the City by section 815.2. While section 820.2 provides immunity to public officers for their discretionary acts, immunity in a police battery case extends only to the officer's initial decision to act, in this case, to detain the driver. It does not immunize the officer from liability for carrying out his actions with unreasonable force. (See *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 260-261.) Thus, we must determine if there is a triable issue of fact regarding the force used here.

The motion must respond to the issues framed by the allegations of the complaint. (See *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1602.) As more fully summarized in our background facts, those allegations are, in essence, that Ulrich ordered Oliver out of his disabled truck, and then shot and killed Oliver as he was attempting to operate it; that Oliver was unarmed and non-threatening, and lethal force against him was unnecessary.

A police officer has a duty to use reasonable care in making a traffic stop and firing of a weapon. (*Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 587.) An officer's intentional shooting of a suspect may give rise to liability in negligence or intentional tort. (See *Munoz v. Olin* (1979) 24 Cal.3d 629, 634.) Both the police officer who commits a battery within the course and scope of his employment, and his employer may incur liability. (*City of Los Angeles v. Superior Court* (1973) 33 Cal.App.3d 778, 782.) "The standard jury instruction in police battery actions recognizes [that] '[a] peace officer who uses unreasonable or excessive force in making a lawful arrest or detention commits a battery upon the

person being arrested or detained as to such excessive force.' (BAJI No. 7.54.)" (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1273.)

"The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate cause between the breach and (4) the plaintiff's injury. [Citation.]" (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339.)

Whether an action alleging injury by a police officer sounds in negligence or intentional tort, the breach element requires proof that the officer used unreasonable or excessive force. (*Edson v. City of Anaheim*, *supra*, 63 Cal.App.4th at p. 1272.) Since the motion for summary judgment was directed at this element of appellant's cause of action, to present a prima facie case for summary judgment, respondents were required to produce evidence to show that the force Ulrich used was reasonable under the circumstances.

"The parties' separate statements 'are intended to permit the judge *to determine quickly* whether the motion is supported by sufficient undisputed facts. If the opposing statement disputes an essential fact alleged in support of the motion, the judge merely has to review the evidence cited in support of that fact. This saves the judge from having to review all the evidentiary materials filed in support of and in opposition to the motion.' [Citation.]" (*St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234, 1248-1249, italics in original.)

"[B]ecause we are reviewing a motion for summary judgment, the relevant facts are limited to those set forth in the parties' statements of undisputed facts, supported by affidavits and declarations, filed in support of and opposition to the motion in the present case, to the extent those facts have evidentiary support. [Citations.] Facts not contained in the separate statements do not exist. [Citation.]" (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 112.)

We perceive these authorities to require the moving party to present sufficient facts within the separate statement to demonstrate a prima facie case for summary judgment without further reference to the evidence supporting the facts. Here, that would mean facts establishing as a matter of law that officer Ulrich acted reasonably when he shot Oliver.

We set out the separate statement of facts verbatim at this point:

> "1. On the evening of July 24, 2000, Steven Ulrich was lying on his couch watching television when he heard a loud explosive type noise outside his residence. The noise was very violent, very explosive, [it sounded like] glass shattering, something coming apart.
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> "2. Steven Ulrich heard the noise again and got up from his couch. He opened his front door to ascertain the cause of the commotion.
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> "3. Ulrich noticed that several neighbors had also come outside. One neighbor, Ron Reagan, was standing next to his cars, which had visible body damage.
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> "4. Ulrich asked Mr. Reagan what had happened to which he responded with a blank stare and shrug of the shoulders.
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> "5. While talking to Reagan, Ulrich heard another crash further west on Friar Street. He asked his wife to call 911 on his cell phone and his a pair of shorts. [*sic*] He heard two more crashes that now sounded like traffic accidents, coming from the same direction.
>
> "6. Ulrich looked west on Friar and saw a white pick-up hit a vehicle on the north side of the street.
>
> "7. While Ulrich was talking to Reagan, another neighbor, Steven Noorda approached in his pick-up truck and yelled 'there he is, let's go get him.'

"8. In response, several people got into Noorda's pick-up and they headed east on Friar towards Jackie.

"9. Believing someone could potentially get hurt, Ulrich followed his neighbors.

"10. When he arrived at the intersection of Friar and Jackie, the white pick-up was facing south west.

"11. Ulrich approached the pick-up, towards the front of the vehicle, off the driver's side of the vehicle. He saw people standing around the pick-up.

"12. Officer Ulrich got out of the way and ordered the driver to turn off the engine and get out of the car again.

"13. Officer Ulrich got out of the way and ordered the driver to turn off the engine and get out of the car again.

"13. Christopher Ray Oliver, died as a result of his wounds.

"14. The driver of the pick-up just looked at Ulrich.

"15. Ulrich ordered the driver of the pick up to again get out of his vehicle. [T]he driver of the pick-up placed his vehicle in reverse, accelerated and was attempting to drive backwards when officer Ulrich fired his service revolver." (First set of brackets in the original, the second two we added. The original contains two items numbered 13 and items 12 and the immediately following 13 contain identical facts.)

Assuming the foregoing facts are all true, they do not establish a prima facie case that Ulrich acted reasonably in shooting Oliver.

"'[T]he "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20

vision of hindsight . . . the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. [Citations.]' [Citation.]" (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 343 (*Martinez*), quoting *Graham v. Connor* (1989) 490 U.S. 386, 396-397 (*Graham*).)

"[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. [Citation.]" (*Graham*, *supra*, 490 U.S. at p. 396.) "Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance." (Pen. Code, § 835a.) The use of *deadly* force, however, is prohibited unless it is used against a fleeing felony suspect and the felony was "a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another." (*Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 333; Pen. Code, § 196.)

Assuming that Ulrich had probable cause to believe that Oliver had committed a crime, the undisputed facts do not establish that Ulrich believed that the crime was a felony. Ulrich heard the sounds of several automobile crashes, and then saw Oliver's truck strike a vehicle. Under the undisputed facts, this may have been the result of mechanical failure, an accident caused by the onset of a medical episode, reckless driving or driving while intoxicated. Nothing in the undisputed facts suggests that Oliver was driving while intoxicated, to support the trial court's conclusion, or that Ulrich had any information leading him to believe that Oliver was driving while intoxicated. And the undisputed facts are insufficient to establish that if Oliver was driving recklessly or while intoxicated, the result of his actions amounted to a "forcible and atrocious" felony. (See *Kortum v. Alkire*, *supra*, 69

Cal.App.3d at p. 333.) Neither reckless driving nor driving while intoxicated amounts to a felony unless it results in bodily injury or involves repeated violations. (See *People v. Jones* (1981) 123 Cal.App.3d 83, 97; Veh. Code, §§ 23103, 23104, 23152, 23153, 23156 et seq., 23554 et seq.)

Nor are the undisputed facts sufficient to demonstrate "circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another." (*Kortum v. Alkire*, *supra*, 69 Cal.App.3d at p. 333.) Oliver had apparently collided with several cars. Ulrich saw the last collision and ordered him out of the truck, but Oliver merely looked at him, put the truck in reverse, accelerated, and attempted to drive backward. There is no undisputed fact in the statement suggesting that anyone was in harm's way when Oliver attempted to drive backward, or that Oliver succeeded in driving backward, or even that Oliver's look was menacing. And the statement fails to address the allegation in the complaint that Oliver's truck was disabled. The undisputed facts do not establish that the truck even *moved* when Oliver accelerated, contrary to the argument proffered in the points and authorities in support of the motion. In sum, there were no undisputed facts showing that Oliver was a fleeing felony suspect or "other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another." (*Kortum v. Alkire*, *supra*, 69 Cal.App.3d at p. 333.)

Since respondents' separate statement of facts did not support summary judgment in its favor, the court was not required to independently search the evidence proffered in support of the motion (*St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.*, *supra*, 111 Cal.App.4th at p. 1248) and it could have denied the motion outright. (*Lewis v. County of Sacramento*, *supra*, 93 Cal.App.4th at p. 112.) But the court apparently did review the evidence and concluded that evidence in opposition proffered by appellant did not raise a triable issue of fact

regarding the reasonableness of Ulrich's actions. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316 [trial court has discretion to consider evidence omitted from the separate statement of facts].)

Although appellant opposed the motion, in part, on the basis of respondents' inadequate statement of undisputed facts, he makes no such objection here. He contends that the evidence raised a triable issue of fact with regard to the reasonableness of Ulrich's actions. Both sides submitted excerpts from Ulrich's deposition. We shall summarize from both excerpts.

Ulrich testified that he was a police sergeant for the Los Angeles Police Department, and had been employed by the Department for 16 years. He was home on the evening of July 24, 2000, dozing and watching television when he heard a loud explosive-type noise outside -- with the sound of glass shattering, and "something coming apart." When he heard the noise again, he got up and looked through a window, but could not see anything. When he heard more similar sounds, he took his service revolver and went outside to his front yard, where he saw neighbors coming out of their homes, including his neighbors, Ron Regan, Regan's father, Mr. Sherman, and Gary Noorda. He heard ten crashes in all.

When Ulrich heard a crash coming from Friar street, he asked his wife to bring him a cell phone and to dial 911. He was speaking to the emergency operator when he heard another crashing sound, and reported its apparent position. While they were connected, he also identified himself to the operator, gave his location, described Oliver's truck, and reported another crash.

Ulrich observed other residents of the neighborhood going toward the scene, and saw Gary Noorda, a witness, and others enter Noorda's truck and drive there. Ulrich was concerned that an angry group of people might hurt the driver, so he ran over there, all the while on the line with the emergency operator. He was also concerned for the safety of the crowd gathering around the scene.

Ulrich could not recall whether the onlookers were in the street or on the sidewalk, but they were "in proximity" to the truck, although they "had not approached" it. He did not attempt to move them away, but told the emergency operator that there was a crowd gathering, and he needed officers there right away.[3]

Ulrich positioned himself about six to ten feet to the side of the front left fender of the truck, away from the direction of the wheels in order to get out of the truck's way, identified himself as a police officer, and ordered Oliver out. In response, Oliver looked at Ulrich. Ulrich was changing his position as he approached the truck, and found himself in front of the truck when it lurched forward. The truck then rolled backward off the curb. Ulrich could not say how far it rolled in either direction or at what speed.

Oliver was trying to put the truck into gear and was pressing on the accelerator, so Ulrich ordered him out of the truck again. Oliver succeeded in putting it in reverse, but the back wheel was spinning, the truck was shuddering and shaking, and Ulrich could not say whether it moved. Ulrich fired two consecutive shots in Oliver's direction, either while Oliver was still trying to put the truck in gear, or after he had succeeded and the wheels were spinning. He testified both ways, and his testimony was not clarified in the excerpts in this record. Ulrich also testified that he was in front of the truck, moving in a clockwise fashion while firing his weapon as Oliver was driving *forward* toward him. He fired nine shots in all.

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[3] Appellant submitted a transcript of the 911 call, showing that Ulrich did not mention the crowd until after the shots were fired. For discussion of respondents' objection to the transcript, see footnote 4, *infra*.

Ulrich denied firing through the passenger window, but then admitted that two or three rounds went through the passenger window. He then admitted that he fired three shots through the passenger window, and that he did not feel that he was in immediate danger when he did so. A portion of the truck was up on the curb when he fired the last three shots, and the onlookers were across the street.

Both parties submitted excerpts from the testimony of Ulrich's close neighbors, Ronald Regan and Noorda. Appellant also submitted the testimony of another witness, Scott Alan Reader.

Regan testified that about 10:30 that evening, he emerged from his house after he heard what sounded like a car hitting trash cans in the alley. He observed two cars and a truck that had been hit, but had no way to know if anyone had been hurt. Many of his neighbors were outside, including Ulrich, who was talking into a cell phone, describing the vehicle as a white Dodge pick-up.

Regan got into his car to pursue the truck, and when he found it, he moved his car so that the bumper was next to the driver-side door, preventing Oliver from opening it. Oliver drove off, but then the truck hit the curb at Friar and Jackie, which knocked the A-frame out of it, causing the two front wheels to face in opposite directions. The truck was stuck, with the front right wheel up on the curb and the others in the street. Regan again placed his bumper in front of the driver-side door to prevent Oliver from opening his door.

Oliver attempted to move his gear-shift lever while revving the motor, but the rear tires merely spun and the truck did not move. About ten or fifteen seconds later, Regan saw Ulrich standing in front of the truck with his weapon pointed toward the windshield. Ulrich yelled, "Turn the truck off, mother fucker, LAPD." Although the rear tires continued to spin, the truck did not move, Oliver was unable to exit the driver-side door and made no attempt to get out on the passenger side.

Ulrich repeated five or six times, "Turn it off, turn the truck off, LAPD." Oliver continued to rev the motor with his left hand on the steering wheel and his right hand on the shifter. Regan then heard four loud bangs, and observed glass breaking and hitting Oliver in the chest, but he did not appear to have been hit. The truck was disabled and did not move at all while the shots were being fired. Regan testified, "I know it wasn't going to move. The frame was sitting on the curb."

Ulrich then ran around to the passenger side of the truck and fired two more shots through the passenger window. Regan pulled his car back about 20 feet after the first shot, since he was in the line of fire. The other neighbors were all about 50 to 75 feet away, on the other side of the street.

After Regan backed up his car, Oliver emerged from the truck and crossed the street holding the right side of his neck with his right hand. When Regan approached him, he lay down, and Regan never saw him move again.

Scott Alan Reader testified that he was in his home that evening when he heard the sound of an automobile collision, looked outside, and saw a white Dodge truck crash into a car directly across the street. He heard the screeching noise of the truck's tires burning, so he got into his own truck and followed the skid marks.

Reader saw a man in the street with his hand to his head. The second time he saw the man, he followed him, thinking that he was the driver of the truck. He discovered that the man was not the driver when they came upon Oliver's truck. The truck was stuck on the curb and "pretty smashed up." Reader stopped his truck about 100 feet from Oliver's truck, and observed the man approach Oliver's truck to within five to ten feet, where he yelled something that Reader could not hear.

The man yelled something for about a minute, and then pulled out a gun and, instantly after doing so, fired three or four shots into the windshield of Oliver's

truck. Reader then turned his truck around and left the area. Asked whether Oliver's truck moved at all during that time, Reader testified that he believed that it did move back about three or four feet and then forward again, but he could not remember whether the shooter was in front of the truck at the time. It was not a very fast movement, "because the truck was pretty wasted at that time."

At the time that the man started firing, however, the truck's front end was completely on the ground, oil was everywhere underneath the vehicle, and Reader could see "a whole lot of transmission fluid." Reader was not a mechanic, but the truck appeared to be disabled, and he could tell that it was "not going anywhere."

Noorda testified that one of the cars Oliver hit was his. He and his next-door neighbor, Sherman, got into Noorda's truck and pursued Oliver's truck for awhile. As they pursued it, they saw it collide with other cars, "left and right." Noorda returned to his mother's house, and about two minutes later, he saw Ulrich come running out of his house and then yelling into a radio or telephone, "Officer needs backup; officer needs assistance," as he ran down the block. Noorda followed him on foot.

Noorda saw and heard Ulrich order Oliver out of the truck. The truck's wheels were spinning, but the truck moved when Ulrich was about four feet in front of it, although Noorda was unable to estimate how far it moved.

Appellant submitted a transcript of Ulrich's 911 call, which includes Ulrich's comments, questions, and orders to person's around him, in addition to Ulrich's conversation with the emergency operators, first the Highway Patrol operator, and then the LAPD operator. He apparently was connected with an emergency operator all the while that he was moving toward the intersection where Oliver's truck came to rest, as well as during and after the shooting. Ulrich stated that he was off duty, wearing just shorts, and no shirt. The transcript reflects just one instance of Ulrich's ordering Oliver out of the truck before gunshots are heard.

The next words from Ulrich came after the gunshots. He said, "Get outta car (background noises). . . . Get out of there motherfucker, get on the ground. Get on the ground. . . . Officer needs help. Get down on the fuckin' ground."

The autopsy report shows that Oliver suffered two gunshot wounds, one on the side of his neck, another on his right shoulder, both traveling from right to left. A toxicology report showed that Oliver had a blood alcohol content of .10 percent in a tested blood sample and .18 percent in a urine sample. Appellant also submitted a copy of the police report, showing that all the vehicles struck by Oliver's truck had been parked, and there had been no pedestrians involved.[4]

Respondents contend that the evidence submitted by appellant was insufficient to meet appellant's burden of proof that Ulrich's actions were unreasonable when measured objectively. Respondents set forth in their brief a list of facts taken from the evidence, from which it may be inferred that Ulrich acted reasonably. Relying on the "objectively reasonable" standard of *Graham*, *supra*, 490 U.S. at pages 396-397, and the guidelines summarized *Martinez*, *supra*, 47 Cal.App.4th at pages 343-344, respondents suggest that the application of the "highly deferential" standard of assessing police conduct requires a finding of reasonable force as a matter of law.

Since this is a summary judgment proceeding, however, a court may not grant the motion "based on inferences reasonably deducible from the evidence, if

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[4] Respondent objected to the admission of the 911 transcript, the coroner's report, and the police report, but the trial court did not directly rule on the objections, and in its minute order granting the motion, the court stated that it had read and considered all documents filed in connection with the motion. Under such circumstances, any objection has been waived, and we must view the evidence as having been admitted into evidence. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1; Code Civ Proc. § 437c, subd. (c); see also, *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784-785.)

contradicted by other inferences or evidence, which raise a triable issue as to any material fact." (Code Civ. Proc., § 437c, subd. (c).)

Even in police battery actions, we must strictly construe the moving party's evidence, liberally construe the opposing party's evidence, and resolve all doubts in favor of the opposition. (See *Jenkins v. County of Los Angeles* (1999) 74 Cal.App.4th 524, 530.) And even when the use of force is measured under an objective standard, summary judgment is proper only where the *undisputed facts* show that the officer's actions were reasonable. (Cf., *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1414-1415; *Martinez, supra*, 47 Cal.App.4th at pp. 346-348.)

Respondents contend that the issue does not present a question of fact at all, but a question of law which the court, not a jury, should determine. They assert that an objective test for the reasonable use of force in a police battery action is comparable to determining qualified immunity in civil rights cases arising under 42 United States Code section 1983, or to determining probable cause for detention or arrest.

Respondents' analogy to qualified immunity in federal civil rights actions was rejected by the very authority upon which they rely to support it. (E.g., *Saucier v. Katz* (2001) 533 U.S. 194.) The Supreme Court cautioned that "qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest." (*Id*. at p. 197.) A determination of qualified immunity is a due process analysis that operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." (*Id*. at p. 206.) While that determination is made by the court, and may be made on the pleadings, the question of liability for excessive force is determined by the trier of fact. (See *id*. at pp. 200-201.)

Respondents' probable-cause analogy fails, as well. Probable cause to effect an arrest or detention is a mixed question of law and fact. (*Ornelas v. United States* (1996) 517 U.S. 690, 697, 699.) In general, mixed questions of law and fact are resolved by *juries*, who determine the historical facts, and then apply the rule of law, as instructed by the court, to those facts. (*People v. Kobrin* (1995) 11 Cal.4th 416, 425.)[5]

"'It is commonplace for the same mixed question of law and fact to be assigned to the court for one purpose, and to the jury for another.' [Citation.] For example, the determination of probable cause in a suppression motion is for the court, while in a prosecution under 18 United States Code sections 241-242 (depriving a person of constitutional rights under color of law) the question is for the jury. [Citations.]" (*People v. Kobrin*, *supra*, 11 Cal.4th at p. 425.)

In a police battery action involving deadly force, it is the jury that determines reasonableness under an objective standard. (See *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077.) In *Munoz*, the jury was sufficiently instructed with regard to the objective standard as follows: "'A police officer may use deadly force to detain only if he has a reasonable belief there is an immediate risk that the person whose detention is sought will cause death or serious bodily harm.'" (*Id*. at p. 1107.)

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[5] """There is considerable misunderstanding in the minds of the general public regarding provisions making a jury the judge of fact and not of law[,] . . . attributable in large part to the inaccuracy of the general rule that juries decide *only* the facts. . . . Juries are always judges of the law in the sense that juries must pass on the manner and the extent in which the law expounded by the judge fits the facts brought out in the evidence. This process requires juries to perform the legal function of interpretation and application. . . ."' [Citation.]" (*People v. Figueroa* (1986) 41 Cal.3d 714, 730.)

Respondents also contend that appellant *concedes* that the facts are undisputed, and asks that we resolve the issue of reasonableness as a matter of law. Nowhere has appellant conceded any such thing.

The question of whether Ulrich or any of the bystanders were in danger is disputed. The question of whether Oliver's truck lurched forward as Ulrich passed in front of it is disputed: Regan testified that it did not move, and was disabled; Noorda said that it moved, but was unable to estimate how far it moved; and Reader testified that the truck moved slowly backward and forward, but could not remember whether Ulrich was in front of it at the time. By respondents' own admission in their statement of undisputed facts, Ulrich "got out of the way," and it was at the moment that the driver put the truck in reverse, accelerated, and attempted to drive *backwards*, that Ulrich fired his service revolver. Further, the evidence showed that the fatal shot came from Oliver's right side. Ulrich admitted that when he fired three shots through the passenger window, he was no longer in any immediate danger. The onlookers were 50 to 75 feet away, across the street, apparently not in danger from the disabled truck.

And even assuming the version of the events in Ulrich's deposition were undisputed, his version fails to show as a matter of law "circumstances [that would] reasonably create a fear of death or serious bodily harm to the officer or to another." (*Kortum v. Alkire*, *supra*, 69 Cal.App.3d at p. 333.) Ulrich testified that he first positioned himself about six to ten feet *to the side* of the front left fender of the truck, and away from the direction of the wheels. He claimed that the truck lurched forward as he was changing his position, and that he found himself in front of it at that moment. A reasonable officer could very well have viewed it as a coincidence that he stepped in front of the truck just as it lurched forward, presenting an immediate danger that required him to get out of the way; and that is apparently what Ulrich did. Ulrich got out of the way but he still fired his weapon

as he moved to the side of the truck. He admitted that by then the truck was rolling backward. He admitted that he was on the passenger side, in no danger, when he fired the fatal shot through the passenger window. And he admitted that the onlookers were across the street and the truck was partially up on the curb.

In sum, the facts established by the evidence filed in support of and in opposition to the motion raise a triable issue of fact regarding the reasonableness of Ulrich's actions that night.

As a fall back position, respondents contend that the danger justifying lethal force can consist of potential danger, where the officer has no reason to believe the danger is otherwise avoidable. Such potential harm was present here, respondents contend, because Oliver *might* have managed to drive off and *might* have put other motorists and pedestrians in danger. In support of this argument, respondents compare the facts of this case to *Dudley v. Eden* (6th Cir. 2001) 260 F.3d 722, where a fatal shooting of a bank robber (Dudley) by an officer (Eden) was found reasonable, even though the bank robber's car had been halted by a collision with the officer's cruiser. (See *id*. at pp. 726-727.) In particular, respondents rely on the following language: "If Dudley had put his car into reverse, he could have continued his escape and Eden would have been powerless to stop him. It would have only taken a few seconds for Dudley to swerve back into oncoming traffic and hit an innocent motorist as he had almost done minutes before." (*Dudley v. Eden*, *supra*, 260 F.3d at p. 727.)

Respondents have omitted the other essential facts of that case: the officer knew that the suspect had just committed a bank robbery, a felony; he knew that many bank robbers are armed; arriving at the scene, he saw another officer standing by the suspect's vehicle which, moments later, sped off as shots were fired; the suspect's vehicle swerved recklessly into oncoming rush hour traffic, returned to the correct side of the street, and headed west towards the highway; and

although the two cars collided, the officer had no reason to believe that he had the suspect under control. (*Dudley v. Eden*, *supra*, 260 F.3d at p. 727.) Each case must be decided on its own facts, and there are no similar undisputed facts here. (See *Martinez*, *supra*, 47 Cal.App.4th at p. 345.)

Respondents provide no authority approving the use of deadly force in an ambiguous situation where the evidence supports different reasonable inferences: whether or not Oliver was involved in felonious criminal activity; whether Oliver *might* get his severely damaged vehicle moving again; and whether Oliver *might* try to escape, and *might* hurt people in the event that he were to succeed in doing so. Whether the evidence supports such a scenario is inherently a factual question to be addressed by the jury.

DISPOSITION

The judgment is reversed. Appellant shall have his costs on appeal.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, P.J. GRIMES, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.